No. 10082.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GERMAIN SEED AND PLANT COMPANY,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR RESPONDENT GERMAIN SEED AND PLANT COMPANY.

LATHAM & WATKINS,
By PAUL R. WATKINS,
By RICHARD W. LUND,
1112 Title Guarantee Building,
411 West Fifth Street,
Los Angeles, California,
Attorneys for Respondent.

Parker & Baird Company, Law Printers, Los Angeles

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Jurisdiction.

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent pursuant to Section 10(c) of the National Labor Relations Act [49 Stat. 449 (1935), 29 U. S. C. Secs. 151-166 (Supp. II, 1936)]. The jurisdiction of this court is based upon Section 10(e) of the Act. Respondent is a California corporation having its principal place of business in Los Angeles, California, where

the alleged unfair labor practices are asserted to have occurred.

The decision and order of the Board (37 N. L. R. B., No. 190, p. 1090) is set forth at pages 132-167 of the record and the complaint issued by the Board under which it held hearings and entered its order and respondent's answer thereto are set forth at pages 8-14 and 21-24, respectively, of the record.

Statement of the Case.

On December 31, 1941, the Board issued its Decision, Findings of Fact, Conclusions of Law, and Order [37 N. L. R. B. No. 190, p. 1090, R. 132-167]. Its Findings and Conclusions may be briefly summarized as follows: Respondent dominated and interfered with the formation and administration of Consolidated Seedmen's Union, Inc. (hereinafter referred to as Consolidated), and contributed support to it, and by these and other acts, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby violated Sections 8(1) and (2) of the Act. The Board ordered respondent [R. 165-167] to cease and desist from dominating and interfering with the administration of or contributing financial or other support to Consolidated or any other labor organization, from recognizing Consolidated, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively

through representatives of their own chosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act. The Board further ordered respondent to withdraw all recognition from and completely disestablish Consolidated, and post appropriate notices.

On March 10, 1942, the Board filed with this Court its petition for enforcement of its order [R. 167-172]. On March 26, 1942, respondent filed its answer to the petition [R. 173-175]. In said answer, respondent challenges the sufficiency of the evidence to support the Board's above mentioned Findings and Conclusions and questions the propriety of the Board's Order.

Respondent does not question the applicability of the National Labor Relations Act to its operations or the jurisdiction of the Board over respondent.

The pertinent provisions of the National Labor Relations Act are set forth in Appendix "A", *infra,* p. 47.

ARGUMENT.

I.

The Board's Findings of Fact From Which It Concludes Respondent Has Violated Sections 8(1) and (2) of the Act Are Not Supported by Substantial Evidence.

A. Formation of the Consolidated.

The account in petitioner's brief of the events leading up to the formation of the Consolidated union is incomplete and therefore, we believe, misleading. We deem it necessary, therefore, to set forth more fully herein the circumstances which preceded the organization of the Consolidated. Prior to detailing these facts, it should be noted that the Board's case rests primarily on the activities of certain employees, all of whom are deemed by petitioner to be supervisory employees for whose actions respondent is responsible. Those individuals are Dwight Gates, Woolcott Hill, W. S. Clark, Walter P. Sage, Vivian Nesbit, Daniel Hatfield, Allen Hook, Kenneth Luck and Harold Frauenberger. In addition, the Board contends that respondent is chargeable for the activity of Dorothy Turton, secretary to respondent's vice-president. It is our contention that only Gates and Hill held positions which identified them with the management and that their activity did not interfere in any way with the rights of respondent's employees under the Act. We will later discuss (*infra*, pp. 16-29) in detail the position of these employees, and in the discussion immediately following we will refer to every bit of activity on their part which the petitioner deems to have been in violation of the Act.

In August of 1937, a local of the American Federation of Labor began a campaign of organization among re-

spondent's warehouse employees. A number of respondent's employees, including Nesbit and Hatfield, at different times approached Sage, a purchasing agent in the sundries department, and discussed with him the desirability of forming or joining a union [R. 185, 187]. Finally, his response was, "You fellows keep running to me about this thing. Now, you must want to do something about it. Now, would you care to meet with me and let us discuss this thing and see what you have on your mind." They said that they would and that "they were waiting for someone to get them together and have a talk with them" [R. 204]. Accordingly, Sage told certain employees to asked the others if they wanted to hold a meeting on a Saturday afternoon [R. 188].

The meeting was held one Saturday afternoon, after working hours, about the middle of August on the warehouse shipping floor. As testified to by Board witness Kadous, a CIO member [R. 301] who had not been an employee of respondent for over a year prior to the hearing [R. 278], having been discharged by Meyberg, respondent's president, at a time when he was president of Consolidated [R. 654], at this meeting Sage "spoke in regard to forming a union, and he brought up, well, the organization that they used to have there, and he thought it would be a very fine thing if we could form something of that order at this time, and as far as I could see, most of them agreed with him" [R. 281].[1] The organization to which Sage referred was the Germain Improvement

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[1]In its brief (p. 6) petitioner states that Sage "impressed upon the employees the fact that respondent would prefer a 'house' union to an 'outside' union, and warned them not to do anything which might jeopardize their jobs." We will discuss hereinafter (*infra*, p. 18), the testimony upon which this statement is based.

Association which had been in existence a number of years earlier. He had been a member of that association and had found it to be a desirable form of organization [R. 186]. The majority of those present expressed themselves as desiring an inside union [R. 191-193, 281]. Sage stated that if they were going to form a union they should have an attorney do it for them, and the group asked that he obtain someone [R. 206, 305].[2] While Sage was the only speaker *as such*, there was general discussion among those present [R. 392, 543-544, 581].

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[2]In its brief (p. 6), petitioner observes that "The suggestion of specified legal counsel is a device frequently used by employers to control incipient organizations among their employees." This statement may be true, but whether it is true as applied to a particular case depends on whether in fact the employer involved suggested the name of an attorney in order to direct the organizational efforts of his employees. There was no such evidence in the instant case, and no basis for even making such an inference. The decisions cited by petitioner certainly are not applicable herein. In *National Labor Relations Board v. Griswold Mfg. Co.*, 106 F. (2d) 713, 718 (C. C. A. 3rd, 1939), the plant manager recommended an attorney to the employees and said he would take care of the fees, as he did; in *National Labor Relations Board v. Ed. Friedrick, Inc.*, 116 F. (2d) 888, 890 (C. C. A. 5th, 1940), the company called a meeting of the employees at which the general superintendent introduced an attorney invited by him to attend who then read to the assembled employees the articles of an inside union at a plant for which he was counsel, which articles were then adopted with minor modifications; in *National Labor Relations Board v. Falk Corp.*, 102 F. (2d) 383, 386-387 (C. C. A. 7th, 1939) aff'd 308 U. S. 453, 60 S. Ct. 307, 84 L. Ed. 396 (1940), the company president suggested an attorney to a committee forming an inside union, arranged a meeting with him, and the committee agreed to conceal who suggested the attorney; in *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. (2d) 862, 867, 868 (C. C. A. 2d, 1938) *cert.* den. 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540 (1938), application cards for an inside union were prepared by the company's attorney; and in *National Labor Relations Board v. J. Freezer & Son, Inc.*, 95 F. (2d) 840, 841 (C. C. A. 4th, 1938), the company's attorney obtained the charter for the inside union. In none of the foregoing cases did the court discuss the significance of the suggestion of the name of or use of the services of the attorney involved, and each of the cases is distinguishable from the instant one on many different grounds.

While Hill, manager of the shipping department, and Gates, manager of the warehouse and mill room [R. 189, 190], and Nesbit, Hatfield, Hook and Luck were present at this meeting, there was no evidence that Hill or Gates said a word, and the testimony does not disclose what, if anything, the other four said. In arranging the meeting, Sage acted on his own. He at no time received any suggestions or instructions from any one connected with the management of respondent with regard to the holding of that meeting or the formation or desirability of an independent union [R. 649-650, 653].

As requested by the employees at the first meeting, Sage arranged for an attorney, Voorhees, to attend a meeting of the men at the warehouse about two weeks later on a Saturday afternoon, after working hours. Sage introduced Voorhees by stating that "they had requested me to bring a legal man to them, and that I had done so, and wished to present Mr. Voorhees" [R. 195]. Though he remained, Sage did not thereafter participate in the meeting [R. 195, 197]. Voorhees informed the men of their "right to form or join any union that they pleased, without the employer having any voice in the matter, and that they had a right to belong to any organization that they might desire, that they could form an independent union if they wished" [R. 210-211]. He then discussed generally independent unions, and introduced the secretary and business agent of the independent union at Cudahy Packing Company who spoke [R. 211-212, 309, 422]. Early in the meeting, Voorhees stated that "the only persons eligible to belong to a union were the workers, and that those who had the right to hire or fire or discipline employees, or who were in executive positions, did not have the right to belong to any union" [R. 211]. Hill and Gates were

informed they were not eligible, and the men agreed that they should leave the meeting, and they did [R. 196-197, 211, 306-307, 482]. No similar demand was made that Nesbit, Hatfield, Hook or Luck, who were not quoted as saying a single word at the meeting, or Sage withdraw. During the course of the meeting various employees suggested that an election be held to determine the wishes of everyone and Voorhees advised them it would be proper to hold an election so everyone would be satisfied [R. 423]. The employees then agreed to hold such an election [R. 296, 297, 483].

Two or three days later the employees, without obtaining consent of the management [R. 296], held a secret ballot election at the warehouse, the Hill Street store and the Van Nuys ranch. Each employee personally deposited his ballot in one of the ballot-boxes [R. 394]. The ballot provided for a choice of CIO, AFL, Independent, or "Have Mr. Meyberg talk to us", in that order [R. 283]. The fourth choice was placed on the ballot because it was the feeling of some of the employees that they did not know enough about the union situation and that therefore they should ask Meyberg to talk to them [R. 544], and perhaps they could that way get desired wage increases without forming any union [R. 300-301]. The results of the election were as follows [R. 287]: CIO: 3; AFL: 33; Ind. Union: 45; Meyberg: 11; spoiled ballots: 10. In its brief (p. 7), petitioner contends that "supervisory" employees arranged the details of the election and helped count the ballots. The evidence merely establishes that

Hook was one of those who arranged the election [R. 394, 423],[3] and that Nesbit and Clark were on a committee of seven employees who counted the ballots [R. 287]; the evidence does not support the Board's assertion that these three individuals were supervisory employees (*infra*, pp. 20-23).

Following the election, on or about September 1, 1937 [R. 316, 446], petitions, headed "Pre-organization Agreement", were circulated among the employees. They recited, in part, the following [R. 316]:

> "We the undersigned, employees of the Germain Seed & Plant Company, desire to form an independent union, for the purpose of dealing with our employer under the provisions of the National Labor Relations Act, known as the Wagner Act, and we do hereby appoint W. S. Clark, Harold Frauenberger, Dorothy Turton, K. R. Luck, A. Hook, H. B. Orr and Morris Stearn as a committee to formulate an independent union for us and to represent us with our employer under the provisions of the National Labor Relations Act known as the Wagner Act."

These petitions were circulated by the committee named therein [R. 445] and by other employees [R. 315-316]. Though there was evidence that some employees signed the petitions during working hours [R. 315], Frauenberger circulated one during his vacation off the respondent's premises [R. 444-445]. The petitions, seven in number, were signed by a large majority of respondent's

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[3]Though Kadous and Hulphers each testified that he "believed" Frauenberger had some part in arranging the details of the election [R. 287-288, 296-297; 313], Frauenberger denied that he had any part in the election [R. 439], and he was not one of those on the committee that counted the ballots [R. 287.]

employees [R. 316-322],[4] and the names appearing thereon were later transferred to a single Pre-organization Agreement [R. 216-217, 444].

On September 9, 1937, the designated pre-organization committee met at the offices of Voorhees [R. 446-449] and signed the Articles of Incorporation of the Consolidated Seedsmen's Union, in which they were named as the initial directors pursuant to regular corporate practice [R. 217-220]. The following night they met at the home of one of their members to draft by-laws [R. 449-450]. On September 14, a general meeting of employees was held in the evening at a rented hall at which representatives and assemblymen were elected and the proposed by-laws were discussed [R. 450-456]. Thereafter, the same evening, the assemblymen and representatives met, elected Frauenberger president, Turton secretary-treasurer, and Viola Gates financial secretary; the representatives were instructed by Frauenberger to talk to the members to obtain information to be used as a working basis in drawing up a contract [R. 456-458]. Around the same time, another general meeting was held in the evening at the Hill Street store.

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[4]Among those who signed were, as the Board points out in its brief (p. 8), O. E. Johnson, assistant manager of the Hill Street store, and Stanley Williams, who was an assistant to the secretary-treasurer of respondent in passing on credits and working on collections and packet seed consignments accounts [R. 373] and who was, we submit, eligible to join the contemplated union. The Board contends that "example was set for the employees when the petitions were signed by" Johnson, Williams, Sage and other allegedly supervisory employees. The signatures of the three named appear on two of the seven petitions [R. 317, 318], and the signatures of Williams and Sage appear near the bottom of one of those two petitions. These employees could hardly have set an example for the 84 out of 104 employees who signed on the other five petitions or who signed the same petition Williams and Sage did, but before they did.

On September 20th, the incorporators met at Voorhees' office in the evening [R. 221-222], and thereafter the same evening held their first meeting as directors [R. 222-227]. The resignations of Clark, Hook, and Orr, who were not present, and of Turton as directors were accepted, and Farley, Fenster, Hatfield and Eaton were elected in their place. On September 28, 1937, the Consolidated wrote respondent, stating that the union represented a majority of the employees, offering the pre-organization agreement and application cards as proof thereof, and demanding recognition [R. 458-459]. After checking the names and signatures of Consolidated's members against the pay roll [R. 658], on October 1, 1937, respondent recognized the Consolidated as bargaining agent for its employees [R. 460-461]. Thereafter the officers of Consolidated negotiated with respondent over 20 proposals submitted by them, many of which respondent agreed to, including wage increases varying from 5 to 18 percent [R. 325-330, 462-476].

Petitioner contends, upon the basis of the above facts, that respondent dominated and interfered with the formation of the Consolidated because it permitted the employees to hold the two warehouse and Hill Street store meetings on company property, it permitted the holding of the election and the circulation of the petitions on company time, and because of the statements of Sage and the participation by him and other alleged supervisory employees in the organization of the Consolidated. Respondent did not consent to the holding of the meetings or the circulation of the petitions. If respondent was chargeable with knowledge thereof, it merely failed to prevent these activities. However, the use of company time and property in organizational efforts is not prohibited by the Act, as the Board apparently contends. It

is only when such use amounts to interference or domination or support by the employer that an unfair labor practice is committed. When the employer is neutral, and permits or silently acquiesces in the use of company property and time in the holding of organizational meetings and the solicitation of members, without discrimination between the various unions who are active, he cannot be said to have interfered or dominated with the formation of or to have given support to any particular labor organization. *Ballston-Stillwater Knitting Co. v. National Labor Relations Board*, 98 F. (2d) 758, 761 (C. C. A. 2d, 1938); *National Labor Relations Board v. Mathieson Alkali Works*, 114 F. (2d) 796, 801 (C. C. A. 4th, 1940).

Here the evidence is conclusive that during the same period that the meetings were held and the petitions were circulated of which the Board complains, the AFL organizers were, to the knowledge of respondent's president [R. 256-257], calling the employees together in little groups on company property [R. 185-186] and were soliciting members on company time [R. 302, 345-346, 419, 507]. Respondent did not interfere with any of these activities. It adopted a neutral hands-off policy, and permitted the solicitation of members and the holding of meetings without discrimination in any respect. Under such circumstances respondent cannot be held to have dominated or interfered with the formation of the Consolidated by permitting the same activities on behalf of that organization as were carried on in behalf of the AFL.

The holding of an election on company time and property is not, as petitioner assumes, illegal.[5] It is only when

[5]The Board regularly holds elections under Section 9(c) on the employer's premises, and the present form of agreement for consent election provides that "employees will not lose pay while voting."

the election is in some respects unfair or the exercise of a free choice is prevented by intimidation or coercion or other circumstances that the results of the election are not indicative of the unrestrained preferences of the employees. No such circumstances were present in the instant case, and the decisions cited by the Board in its brief (pp. 7-8) are therefore clearly distinguishable.[6]

The election herein was suggested by and agreed to by the employees [R. 296, 297, 483]. It was held without the consent of respondent [R. 296]. The ballot was more than fair; the CIO and AFL were given preferred positions thereon above the choice for an independent union. It was a secret ballot election. No officer, superintendent, foreman, or other supervisory employee had any part in it. (*Supra*, p. 8). There was not one word of evidence

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[6]In all of the cases cited by the Board except *National Labor Relations Board v. Christian Board of Publication*, 113 F. (2d) 678, 680 (C. C. A. 8th, 1940) the "elections" were called by and held by the companies involved. In the following cited cases, the ballots were definitely unfair: *National Labor Relations Board v. Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9th, 1940) *cert.* den. 312 U. S. 678, 61 S. Ct. 447, 85 L. Ed. 1118 (1940) ("It will be observed that the ballot is skillfully worded so as to suggest adverse criticism of the Union, and the implication is plain that a 'Yes' vote is desired."); *Titan Metal Mfg. Co. v. National Labor Relations Board*, 106 F. (2d) 254, 260 (C. C. A. 3rd, 1939) *cert.* den. 308 U. S. 615, 60 S. Ct. 260, 84 L. Ed. 514 (1939) ("We call [the ballot] unique because it contains in one document a campaign appeal and the opportunity to decide the issue campaigned about."); *National Labor Relations Board v. American Mfg. Co.*, 106 F. (2d) 61, 65 (C. C. A. 2nd, 1939) aff'd 309 U. S. 629, 60 S. Ct. 612, 84 L. Ed. 988 (1940) ("[The ballots] as a means of electing delegates to bargain for the employees, were a complete farce."). In the following cases the election was conducted just after the complaining union had been designated as representative by a majority of the members; *National Labor Relations Board v. Crystal Spring Finishing Co.*, 116 F. (2d) 669, 672 (C. C. A. 1st, 1941); *National Labor Relations Board v. New Era Die Co.*, 118 F. (2d) 500, 503 (C. C. A. 3rd, 1941); *National Labor Relations Board v. Colten*, 105 F. (2d) 179, 181 (C. C. A. 6th, 1939); *American Mfg. Co., supra;*

indicating any employee was coerced or intimidated in voting, or that anyone connected with the management urged any employee to vote a particular way. There was even no evidence that any of the workers whom the Board contends are supervisory employees said a single word to influence the vote. Under such circumstances, the fact that the election was held on company time does not constitute evidence of interference or domination. *National Labor Relations Board v. Swank Products, Inc.,* 108 F. (2d) 872, 874 (C. C. A. 3rd, 1939); *Diamond T Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 980 (C. C. A. 7th, 1941).

Sometime prior to the election, respondent distributed to its employees "A Statement of Facts", signed by respondent's president [R. 259].[7] This statement was the

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Christian Board of Publication, supra. In the following cases the "election" was not conducted by secret ballot: *American Mfg. Co., New Era Die Co., Colten, Christian Board of Publication, supra.* In the following cases there was considerable coercion or intimidation, as, for example, the discharge of employees for union activity, just prior to the election; *National Labor Relations Board v. Automotive Maintenance Machinery Co.,* .... U. S. ...., 62 S. Ct. 608, 86 L. Ed. 559 (1942) rvs'g 116 F. (2d) 350, 351 (C. C. A. 7th, 1940); *Crystal Spring Finishing Co.; Colton, supra.* In *National Labor Relations Board v. Remington Rand, Inc.,* 94 F. (2d) 862, 870 (C. C. A. 2nd, 1938) *cert.* den. 304 U. S. 576, 58 S. Ct. 1046, 82 L. Ed. 1540 (1938), following a strike vote taken by the union, the company undertook its own strike vote in which the union members refused to participate; the results of this "election" were therefore indecisive. In the *Christian Board of Publication* case, the company conducted a fair secret ballot election in which the outside union won; the company did not then announce the results of the election; about a week later certain supervisory employees circulated a petition asking a raise and solicited the employees to sign the petition; the employer recognized an inside union on the basis of this petition.

[7]The evidence does not definitely establish just when this statement was distributed [R. 257-258]. The Board found that it was distributed "shortly after" the first meeting on the warehouse shipping floor [R. 160].

only pronouncement by respondent during this period of its views on union matters. Respondent stated therein in part:

> "You do not have to join any labor union or organization in order to hold your job. * * *
>
> "You do not have to pay dues, levies, nor any kind of tribute to any organizer or group to hold your job.
>
> "You do not have to belong to any organization to get wage increases or enjoy shorter hours. Whenever these benefits are possible they are made to those who do not belong to any organization just the same as to those who do.
>
> "You do not have to be a member of any organization. Likewise, you are at liberty to join any lawful organization."

This statement did not contain a single word suggesting that respondent desired the formation of an inside union. The Board's finding [R. 161] that by the statement respondent "made amply clear to its employees that it would not look with favor upon their affiliation with an 'outside' union" is clearly unwarranted. *Diamond T Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 981 (C. C. A. 7th, 1941); *Midland Steel Products Co. v. National Labor Relations Board,* 113 F. (2d) 800, 803 (C. C. A. 6th, 1940). If the statement can possibly be construed as "anti-union", it was anti-all unions, independent as well as affiliated.

A majority of those employees who voted in the election for any union, voted for an independent. Pursuant to this indication of preference, petitions were then circulated which designated a committee to form an independent union. There was no evidence of a single word having

been said by any employee or supervisor to induce anyone to sign the petitions. The only evidence in this connection was the testimony of one witness who when asked what were the circumstances under which he signed the petition, replied "That we were willing to go into this Independent Union" [R. 395-396]. It is submitted that there is not a scintilla of evidence that respondent, by failing to prohibit the holding of three meetings on its property, the holding of the election, and the circulation of the petitions on company time, dominated or interfered with the formation of or contributed support to the Consolidated.

As mentioned at the opening of our brief, petitioner also relies on the activities of the following employees as establishing a violation of the Act by respondent: Sage, Hill, Gates, Clark, Nesbit, Hatfield, Hook, Luck, Frauenberger, and Turton. We will discuss separately the activities of each of these employees and the responsibility of respondent therefor.[8]

Sage. The Board contends that the activity of Sage in arranging the two warehouse meetings and in making the statements he did and in suggesting the name of an attorney at the first of these meetings was improper, and that his activities and statements are chargeable to respondent. Since 1933 or 1934 [R. 184], Sage had been the purchasing agent in the sundries department [R. 184-185, 651]. He had no authority to recommend hiring or

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[8]Although the Board complains of the activities of Nesbit, Hatfield, Hook, Luck and Turton in the administration of the Consolidated as officers and directors following its formation, our discussion will be limited to their participation in its initial organization. If the Consolidated was not formed in violation of the Act, the subsequent participation of these individuals in its administration could not convert it into an employer-dominated union.

firing [R. 651], and at no time did he have any employees working under him or did he supervise or control the work of any employee [R. 208]. The Board contends (petitioner's brief, pp. 9, 18-19) that the employees believed Sage was acting for and on behalf of the management because some of them took the position at the Hill Street store meeting that he was ineligible to belong to the union after Voorhees expressed his views as to who was eligible [R. 198-200, 213]. At Voorhees' request, Sage left before the meeting was opened. We submit that if this circumstance establishes anything, it is only that these employees were of the opinion that Sage was not eligible to join the Consolidated. If it constitutes any evidence that the employees believed Sage was acting for and on behalf of the management, it furnishes stronger evidence that they were not dominated, interfered with, or led by him since they did not hesitate to challenge his right to attend the meeting.

In arranging the two warehouse meetings, Sage acted on his own and without consent of respondent's officers but with the approval of the employees [R. 204]. He did not participate in the second meeting except to introduce Voorhees. His suggestion of the name of an attorney was not improper. *Magnolia Petroleum Co. v. National Labor Relations Board,* 112 F. (2d) 545, 551-552 (C. C. A. 5th, 1940). It was at the request of the employees that he had Voorhees attend the second meeting [R. 305]. Voorhees had no connection with respondent and he served the Consolidated faithfully as its attorney, when the occasion required, continuously up to the time of the hearing.

At the first warehouse meeting, Sage stated that he thought it would be a good thing to have an inside union and, according to the testimony of Hulphers, that the

heads of the company would rather see a house union go in [R. 304]. Such expressions of fact and opinion, even if it be assumed respondent was chargeable with Sage's statements, do not constitute interference or domination (*infra*, p. 37). According to Hulphers [R. 304], Yoakum [R. 392] and Freeman [R. 421], Sage is also supposed to have stated something to the effect that Meyberg and Schoenfeld, respondent's president and vice-president, respectively, had enough money and could close the plant doors. We sincerely believe that this is the only evidence of possible interference in the entire record, even if we assume respondent is chargeable with that statement. However, in view of the following circumstances, and recognizing the power of the Board to determine the credibility of witnesses, we submit that this testimony does not amount to a scintilla of evidence.

In the first place, it should be noted that the alleged statement does not even contain a threat; Sage is supposed to have said, not that respondent *would* close the doors, but that it *could*. Secondly, not only did Sage deny making the statement [R. 191-194, 650], but neither Kadous nor Luck, the only other witnesses who testified as to the discussion at this meeting, recalled any such statement [R. 281, 581]. Kadous, as has heretofore been pointed out (*supra*, p. 5), was a witness called by the Board, was a CIO member at the time of the hearing in April, 1941, and was not then an employee of respondent, Meyberg having discharged him in January, 1940 while he was president of the Consolidated. In view of the fact that Hulphers, Yoakum and Freeman were all members of the AFL, the complaining union, certainly the preponderance of the evidence establishes that Sage did not make the alleged statement Freeman's performance on cross-

examination was alone sufficient to render his testimony on direct completely worthless [R. 427-430]. Hulphers admitted his bias against the Consolidated and, as we shall hereinafter point out (*infra,* pp. 32-34), these three witnesses even prior to the hearing commenced a campaign on behalf of the AFL to discredit and cause the dissolution of the Consolidated. Assuming Sage made some such statement, apparently it did not impress Hulphers, Yoakum or Freeman or anyone else. There is nothing in their own testimony indicating that they ever had any fear of campaigning openly for the AFL, and not only was there no evidence that they ever mentioned this alleged statement of Sage until the hearing, but if the statement was made it did not dissuade them from joining the AFL. *Cf. Diamond T Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 982 (C. C. A. 7th, 1941); *Ballston-Stillwater Knitting Co. v. National Labor Relations Board,* 98 F. (2d) 758, 762 (C. C. A. 2d, 1938). Moreover, there was no evidence that any employee assumed that Sage purported to speak for respondent at this meeting.

The most significant fact to be considered in connection with this alleged statement of Sage is that the record establishes conclusively that respondent has not discriminated between members of the AFL, CIO or Consolidated, or non-union employees in any respect whatsoever. There is no evidence that any officer of respondent or any foreman or supervisor (with one possible exception, discussed *infra,* p. 37) of respondent even made any statement disparaging or criticising the AFL or any national union, and respondent has not at any time even sought to prevent the solicitation of its employees while working by the AFL organizers. Moreover, assuming Sage made the state-

ment attributed to him, its effect, if any, was offset by the statement of Voorhees at the second meeting that the employees had the right to form or join any union without the employer having any voice in the matter. Finally, the asserted statement of Sage was disavowed by respondent when it distributed shortly after the first warehouse meeting under the signature of its president the Statement of Facts heretofore referred to (*supra,* p. 14). *Diamond T Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 982 (C. C. A. 7th, 1941). It is submitted that respondent is not chargeable with the acts or statements of Sage and that in any event there is no substantial evidence that his acts and statements interfered with or dominated the formation of Consolidated.

Hill and Gates. Concededly these two men were foremen. They were present at the first warehouse meeting, and were dismissed from the second shortly after it opened. They did not say a word at either meeting. Certainly such facts are not evidence of interference or domination. *Cf. L. Greif & Bro., Inc. v. National Labor Relations Board,* 108 F. (2d) 551, 556-557 (C. C. A. 4th, 1939).

Clark. We do not concede, as petitioner asserts in its brief (p. 18), that Clark was in a position of authority. He was not, as petitioner assumes, in charge of respondent's Van Nuys nursery at the time here involved. It was not until early in 1939 that he became in charge of the nursery [R. 382]. In the fall of 1937, Clark had charge of the nursery *department* of the *Hill Street retail store* [R. 256, 372] which had about fifteen employees [R. 180] and a manager and assistant manager [R. 373]. Evidence that he had "charge" of a department "is insuffi-

cient to prove that he supervised any employee". *National Labor Relations Board v. Sparks-Withington Co.,* 119 F. (2d) 78, 82 (C. C. A. 6th, 1941). Clark was on the commitee of seven that counted the ballots following the election, he was on the pre-organization committee, and signed the Articles of Incorporation of the Consolidated. Though petitioner asserts that Clark "took an active part in securing the signatures of employees" to the pre-organization petition, actually there was not one word of testimony of any activity on Clark's part. He did not attend the meeting of the committee when they worked on the by-laws [R. 449], and did not attend the first meeting of the incorporators [R. 221] or of the Board of Directors, and his resignation was accepted at this last mentioned meeting [R. 222-223]. Certainly nothing in Clark's activities or his position furnishes any evidence of domination or interference of the Consolidated by respondent.

Nesbit. He worked on the fourth floor under Hill and Gates in filling orders. He was the oldest employee in the department in which the number of employees varied from two to five [R. 512-513]. He testified that he was never in charge of this floor,[9] that no one assigns the

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[9]At the hearing in April, 1941, AFL Hulphers, who had been on the fourth floor since January, 1941, testified that he was then working "under" Nesbit [R. 272]. AFL Loy, who was first hired about February 15, 1940 [R. 627], testified that he worked under the supervision of Nesbit who gave him his assignments of work [R. 628]. AFL Yoakum testified that for a month he had been working on the fourth floor and that if there was something in stock Nesbit wanted piled away or some order he wanted packed then he packed it, and that was then his job to pack or pile stock away [R. 389-390]. Aside from the fact that these three witnesses were new employees in Nesbit's department and it would be natural that he, an older employee in the department, would lead them, the testimony of these witnesses does not establish anything about Nesbit's duties in the fall of 1937.

men work, each knowing what he is to do [R. 514], but that if he was called away he might ask one of the other men to fill his order [R. 516]. He worked along with the other men in the department [R. 401], did not recommend hiring or firing, and was never asked as to the quality of any other employee's work [R. 515]. All of the testimony concerning Nesbit's duties is contained in the following pages of the record: 272, 389-390, 401, 512-516, 628.

Nesbit attended the two warehouse meetings and was on the committee that counted the ballots. The duties and activities of Hatfield, Hook, Luck, Frauenberger and Turton will be related prior to considering whether or not respondent was chargeable for the activities of any of them and whether or not, if so, their action was in any respect in violation of the Act.

Hatfield. He was engaged in and was responsible for the filling of orders on the fifth and sixth floors. He occasionally had one helper and sometimes two. When he needed a helper, he asked Gates for one if he could contact Gates; if not, he would "grab" a general laborer to help. He would tell the helper what to do and see that he did it properly. He never reported to Gates about the quality of work done by any helper or made any other comments about his work [R. 506-511]. Hatfield was present at the two warehouse meetings and was elected to the Consolidated Board of Directors on September 20, 1937.

Hook. He was the only regular employee engaged in cleaning seeds [R. 483]; during certain seasons there were as many as twelve employed in this department. All worked under Gates, though Hook would relay Gate's orders to the others [R. 484] and would guide the others

and ask them to do certain things [R. 486]. He worked with his hands along with the others [R. 401], did not have the power to and was never asked to recommend as to hiring and firing, and was never asked for his opinion as to the quality of another employee's work [R. 479, 485, 651]. On one occasion another worker refused to do what Hook asked him to, stating that he didn't have to do what Hook told him to do; Hook admitted that he had no authority and asked him to see Gates [R. 485]. All of the evidence concerning the duties of Hook is contained in the following pages of the record: 190, 272-274, 387-389, 418, 478-481, 483-491, 651-652. Hook attended the two warehouse meetings, had some part in arranging the election, and was on the pre-organization committee.

Luck. He worked in the bulb department under the supervision of Pieters [R. 540, 584]. In the slack season he was the only employee in the department [R. 585] and did everything from sweeping the floor to keeping the stock, filling orders, and buying merchandise [R. 583]. In the busy season, which lasted about seven months each year, there would be at most five employees in the department [R. 585], all green workers, and Luck would instruct them, "Do this," and "Do that; that is red and blue" [R. 583-584]. He had no power to hire or fire [R. 577], and had nothing to do with layoffs [R. 587-588]. When a worker in the department wasn't getting the job done, Luck would go to Pieters and tell him he would like to have that employee replaced and put on some other job [R. 577]. The following pages of the record contain all the testimony concerning the duties of Luck: 539-540, 577, 583-588. Luck attended the two warehouse meet-

ings, was on the pre-organization committee, and was a member of the first Board of Directors of the Consolidated.

Frauenberger. In the fall of 1937, Frauenberger was the city shipping clerk under Hill [R. 383, 384, 432]. He did manual labor, worked with the merchandise, helped load the trucks [R. 385], checked the loads, and attended to the air tubes and complaint calls [R. 432]. On orders of Hill, he distributed work to the drivers and dispatched the trucks [R. 384, 432-433]. He had no authority to hire or fire or recommend hiring or firing [R. 651], and had no authority to reprimand truck drivers for not doing their work properly [R. 385]. At the time of the hearing, the city shipping clerk was Watson [R. 652], a member of the AFL [R. 519, 623]. All of the evidence concerning the duties of Frauenberger is contained in the following pages of the record: 273, 279, 383-386, 432-437, 651. Frauenberger was on the pre-organization committee, solicited signatures to the petitions, was a member of the first Board of Directors and was the first president of Consolidated.

Turton. She was the secretary of respondent's vice-president. She was on the pre-organization committee, the first Board of Directors of the Consolidated until September 20, 1937, and was the first secretary of the Consolidated. Since office employees were included among the members of the Consolidated, certainly it was proper for Turton to be a member of and take an active part in the formation of the Consolidated. The secretary of respondent's president was not a member of the Consolidated, and Meyberg advised her that she could join or not as she pleased [R. 655].

It is submitted that the activities of Nesbit, Hatfield, Hook, Luck and Frauenberger, upon which petitioner principally relies, do not establish that respondent has violated the Act. Even if we assume for purposes of argument that they were supervisory employees, that fact alone does not establish that their participation in the organization of an inside union constituted interference or domination by respondent with the formation of the union. *National Labor Relations Board v. Mathieson Alkali Works,* 114 F. (2d) 796 (C. C. A. 4th, 1940); *Magnolia Petroleum Co. v. National Labor Relations Board,* 112 F. (2d) 545 (C. C. A. 5th, 1940); *National Labor Relations Board v. Sparks-Withington Co.,* 119 F. (2d) 78 (C. C. A. 6th, 1941); *National Labor Relations Board v. Swank Products, Inc.,* 108 F. (2d) 872 (C. C. A. 3rd, 1939). Only in the event the employees had "just cause to believe that [they] * * * were acting for and on behalf of the management," would their conduct be chargeable to respondent and establish a violation of the Act. *International Ass'n of Machinists, etc. v. National Labor Relations Board,* 311 U. S. 72, 80, 61 S. Ct. 83, 88, 85 L. Ed. 50, 56 (1940). While the supervisory status of any employee is a circumstance to be considered in determining this question, it is only one of the factors to be taken into account. Other factors, as, for example, the employer's union attitude, are of equal importance.

Nesbit, Hatfield, Hook, Luck and Frauenberger were not general foremen or working foremen. They did not have the authority to recommend hiring or firing or to discipline any employee or to report on the quality of work of any employee, and they worked at the same general type of work as the other employees in the depart-

ments in which they were employed. If deemed to have any supervisory status, they were merely key or lead men. They were, in general, older employees with more experience and intelligence and a better education than many of respondent's employees. They were the type of men who would naturally take the lead in any endeavor in the plant, whether it be union organization, a political campaign, solicitations for the Community Chest, the establishment of payroll defense tax saving plan, or anything else. Such fact is not any evidence, however, that the employees believed them to be acting on behalf of the management.

It is very significant that none of these key men are quoted as having made a single anti-AFL statement or as having purported to speak for respondent. There was not a word of testimony that any of them ever sought even to influence an employee's choice of unions. In view of the similar silence of respondent's officers, they can hardly be said to have been acting for respondent in organizing the Consolidated. It is also significant that the record contains no evidence of any particular activity on the part of any of them, except Hook who assisted in arranging the election, until after the employees had by secret ballot indicated their preference for an inside union. It was then that they, along with others, took the initiative in organizing the Consolidated. If their efforts had been directed toward soliciting membership in the AFL, we doubt that anyone would have ever contended that

because of their positions, respondent was chargeable for their acts.

The four cases relied upon by the petitioner in its brief (pp. 20-21) as establishing employer responsibility for these "subforemen" are clearly distinguishable.[10] It is significant that petitioner does not cite a single case where

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[10]The cited cases will not be discussed in detail; we will merely point out some of the distinguishing factors in each of them. In *International Association of Machinists, etc. v. National Labor Relations Board*, 311 U. S. 72, 61 S. Ct. 83, 85 L. Ed. 50 [1940] the company was violently anti-CIO. Four supervisory employees, three of whom had been the leaders in a company-dominated union, conducted a campaign for the AFL, during which they stressed the fact that the employer would prefer those who joined the AFL to those who joined the CIO and that the employees could withdraw from the AFL after they had beaten the CIO. While they apparently did not have the power to hire and fire, these four employees all had men working under them and they exercised general authority over the employees. In *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368 (1941), the employer was definitely anti-union, having, among other acts, discharged men for union activity. In this setting supervisors and foremen who had general authority over the employees organized an inside union. In *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1941), supervisors and foremen were extremely active in forming an inside union during the course of which they made threatening statements. The employer merely contended that he was not responsible for their activities because he had not authorized them so to act. In *National Labor Relations Board v. Pacific Gas & Electric Co.*, 118 F. (2d) 780, 786-788 (C. C. A. 9th, 1941), the company based its defense solely on the same ground. The supervisory employees there involved were division superintendents, general foremen, and job foremen, all of whom had authority to administer reprimands, report on the performance of the men working under them, and make recommendations as to discharges. These supervisory employees made statements to the workers to the effect that if the CIO won the election, men would lose their jobs and the company would contract its work out. Moreover, the Board found that these employees "did in fact hold positions with the respondent which gave them certain powers of direction over other employees, who identify them with the management." The company did not challenge this finding.

an employer has been held responsible for the activities of lead men such as those here involved. On the other hand, in *National Labor Relations Board v. Arma Corp.*, 122 F. (2d) 153 (C. C. A. 2nd, 1941), notwithstanding the fact that an employee was discharged for CIO activity just prior to the formation of an inside union, the Circuit Court of Appeals for the Second Circuit held that the inside union was free from employer domination although certain key men or straw bosses were active in its formation. In this connection, Judge Augustus N. Hand stated (p. 156):

> "The principal ground suggested for the finding that Independent was company-dominated is the action of 'key men or straw bosses' which is said to have amounted to coercion and to have been binding on Arma within the doctrine of International Association of Machinists v. National Labor Relations Board, 311 U. S. 72, 61 S. Ct. 83, 85 L. Ed. 50; H. J. Heinz Co. v. Labor Board, 311 U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309, and Labor Board v. Link-Belt Co., 311 U. S. 584, 61 S. Ct. 358, 85 L. Ed. 368. One of the foremen named Wallicki suggested to Raue, who was the originator of the C.I.O. movement in Arma that Raue should join the A. F. of L., of which Wallicki was a member. This suggestion was in the course of a conversation begun by Raue outside the plant and seems to have been the only instance of even a possible act of interference by any one of as high rank as a foreman. It naturally had no effect on Raue or anyone else. The key men were not supervisory employees in any proper sense, but were only an amorphous group of employees senior to small groups of from one to four appren-

> tices or workmen junior in service to the key men, who were supposed to furnish leadership and advice to the juniors in a limited field. The key men, like the other workmen, were paid by the hour and received no additional compensation by reason of services rendered as key men as distinguished from their ordinary tasks, with the possible exception of a negligible bonus at Christmas. If such employees were not to be free to express their opinions and to urge fellow-workmen to organize in a certain way, the interest and activity of the most competent men in the appropriate bargaining group would be eliminated. The key men had no power to hire or fire apprentices assigned to them, or to recommend any of them for promotion. There was no evidence that the officers or supervisory employees consented that key men should represent the views of the corporation, or gave the other workmen reason to suppose that the key men worked for Independent in order to please Arma. If the latter had interfered with the labor activities of the key men, except to prevent canvassing during working hours, it surely would have been guilty of an unfair labor practice and would have deprived these men of rights guaranteed under Section 7 of the National Labor Relations Act, 29 U. S. C. A. §157."

We submit that there is no substantial evidence that respondent dominated or interfered with the formation of the Consolidated and that the Board's finding cannot be sustained.

B. Asserted Inadequacy of the Consolidated as Bargaining Representative.

The Board contends (petitioner's brief, pp. 10-14) that the subservience of the Consolidated as bargaining agent is demonstrated by the asserted facts that it never sought a written contract, that it consistently refused to present to respondent employee demands for further wage increases, and that in 1940 respondent gave it credit for wage increases which it had refused to seek. At the outset of our discussion we wish to point out that it is not the function of the Board to "sit as a board of censors in testing the form and effectiveness of each labor organization brought to its attentions," *E. I. du Pont de Nemours & Co. v. National Labor Relations Board,* 116 F. (2d) 388, 398 (C. C. A. 4th, 1940) *cert.* den. 313 U. S. 571, 61 S. Ct. 959, 85 L. Ed. 1529 (1941). Undoubtedly in the usual situation an inside union does not have as much strength and power to enforce its demands as the large international unions have. However, employees may willingly sacrifice this power in order to enjoin the advantages of an inside union (see *National Labor Relations Board v. Sterling Electric Motors, Inc.,* 109 F. (2d) 194, 201 (C. C. A. 9th, 1940)), not the least of which in importance are the power of the employees to control and determine their own actions and freedom from the necessity of going on sympathetic strikes. It may be that the Consolidated did not obtain all the concessions which an AFL union might have secured by strikes or threats of economic coercion, but this does not establish that the Consolidated was employer-dominated.

There is no magic in a written contract, and the failure of Consolidated to obtain one does not establish anything.

The fact is that Consolidated did make definite agreements with respondent [R. 325-327, 467, 471-476, 574-575], although no signatures were affixed thereto.

The failure of the officers of Consolidated to demand the wage increases sought in the petition of February, 1938, which was prepared and circulated by Hook [R. 493, 522], is not surprising in view of the fact that just a few months previous Consolidated had obtained wage increases of from 5 to 18 percent [R. 328, 470]. Moreover, continually since its formation, the Consolidated frequently made demands upon respondent for adjustments and improvements in working conditions, hours and pay, and respondent granted many of these demands, including wage raises [R. 546-550, 557-558, 571-572, 644-645, 658-670, 679-680].

The Board's contention that Consolidated refused in 1940 to seek wage increases and that respondent dominated it by giving it credit for the increases granted is not supported by the evidence. The following facts in this connection are undisputed. At the August 20, 1940 meeting of the Consolidated [R. 358-359] it was moved and carried that petitions for new wage scales be circulated. Hook, a director of the Consolidated, and Butterfield, who was elected president of the Consolidated on September 23, 1940, did in fact prepare and circulate petitions for wage increases [R. 350-351, 622-623, 637-638]. These petitions were presented by Butterfield to Meyberg at either the September 4 or September 17, 1940 group meetings with him [R. 364, 368, 623]. According to the testimony of Hulphers, at the September 17 meeting when Meyberg asked him if he was the speaker for the men, Hulphers replied "No", [R. 340-341] "because the vice-

president of the Consolidated Seedmen's Union was there, and I figured it was his place to do the speaking and to carry on the meeting" [R. 349]. At the general meeting of Consolidated members on September 13, 1940, the circulation of additional petitions for wage increases was agreed upon [R. 360-361]. On September 23, 1940, the Board of Directors of the Consolidated held a special meeting at which they voted Watson out of office as president and elected Butterfield president in his place, and they then adjourned to meet with Meyberg [R. 519] and presented the additional petitions to him at that time (Board Exh. 34-A). Following his election as president, Butterfield took an active part in securing the wage increases [R. 602-603]. Again on October 3, the Board of Directors met with Meyberg concerning their demands [R. 589-590]. Finally on October 8, 1940, the Board of Directors met with Meyberg to report on the acceptance of his proposed wage increases [R. 592-594]. Thus it appears that the Consolidated was responsible for initiating, negotiating and securing the wage increases of October, 1940. Respondent gave blanket wage increases at this time. As Consolidated was the duly designated bargaining agent for the employees, it was respondent's duty to bargain with it and if it had granted these wage increases without negotiating with the Consolidated, it would have committed an unfair labor practice.

We submit that the evidence establishes that Watson, Hulphers, Yoakum, Freeman and other members of the AFL were engaged in a concerted attempt to destroy the Consolidated and that it was part of their campaign to make it appear that Consolidated was ineffective as a bargaining agent and to assert that respondent gave credit

to the Consolidated for the 1940 blanket wage increases in violation of the Act. The Board points out in its brief (p. 11) that in August, 1940 when "an employee proposed at a Consolidated meeting that an attempt be made to obtain a signed agreement, the president stated simply that 'we could not get it' ". It was John Epperson, *a member of the AFL* [R. 621], who said at that meeting that "what we should have is a signed agreement". The minutes recite that, "President Watson said we could not get it" [R. 359]. There was no evidence that Watson had ever consulted any officer of respondent concerning or ever made a demand for a signed agreement. Watson was at that time a member of the AFL as he had been since before he was elected president of the Consolidated.[11] At the meeting of the Consolidated Board of Directors of September 23, 1940 when Watson was asked to resign as president because he was a member of the AFL, he refused to do so. He was then voted out of office [R. 519].

The Board further contends (petitioner's brief p. 11) that in the summer of 1940 the members of the Consolidated were told by their representatives that "it was absolutely impossible to get a raise". The only testimony in this regard was that of AFL member, Loy, who, without identifying the speaker and without stating whether or not he was a director or officer of the Consolidated, testified that at a Consolidated meeting it was said it was impossible to get a raise [R. 640-641]. The minutes of

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[11]Watson was elected president of the Consolidated on February 6, 1940 [R. 263-264]. John Epperson testified that he started to work for respondent in January, 1940 and that Watson was at that time a member of the AFL [R. 619, 623].

the Consolidated do not reflect any such statement and Loy admitted that he was not present at the meeting at which this statement was supposedly made.

Hulphers, the Board's star witness, admittedly was against Consolidated from the beginning [R. 347, 354]. He went to the Hill Street store meeting in the fall of 1937 merely to see who attended it and then left [R. 314, 354]. On September 3, 1940, Yoakum, Freeman, Loy, John Epperson and others went together to the AFL office where they signed application cards [R. 331-332]. The following day Hulphers, Loy and Montgomery had the meeting with Meyberg referred to in petitioner's brief at page 12. On September 13, at a meeting of the Consolidated, Hulphers and Freeman declined nominations as directors and at the same meeting Hulphers moved for a ballot to disband the union [R. 354-355, 360-361]. On top of all this, Hulphers testified that he solicited Loy (during working hours, of course) to become a member of Consolidated [R. 323-324]; and at that time Loy was to Hulphers' knowledge also a member of the AFL!![12] If, as petitioner contends, the Consolidated was not as an effective bargaining agent in 1940 as the Board deems it should have been to be a free agent, the responsibility therefor is not that of respondent but of Watson, the president of the Consolidated, Hulphers, and the other AFL members who were seeking to break it up. It is submitted, however, that there is no merit whatsoever in petitioner's contention that the Consolidated was a sub-

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[12]Hulphers testified that it was the middle of the summer of 1940 when he solicited Loy to join Consolidated [R. 324]. Loy testified that it was after he had joined the AFL [R. 629] and according to Hulphers' own testimony he was with Loy when Loy signed an AFL application on September 3, 1940 [R. 331-332].

servient bargaining agency and that respondent sought to conceal its ineffectiveness by given it credit for the 1940 wage increases.

C. Respondent's Asserted Financial and Other Support of the Consolidated.

If the Consolidated was not formed in violation of the Act, it is submitted that nothing in the circumstances relied on by the Board in its brief (pp. 14-15) establishes financial or other support of the Consolidated, the bargaining agent, by respondent in violation of Section 8(2). The activities of the Consolidated members on company time were carried on without the permission of respondent [R. 576-577]. Though there was some solicitation of members in the Consolidated on company time,[13] as we have heretofore pointed out, solicitation for the AFL was similarly carried on without interference by respondent. As to the collection of dues by the Consolidated, it is significant that on the only occasion when this activity was observed by an officer or foreman of respondent, Gates reprimanded Hook for collecting dues during working hours [R. 626].

The notices of meetings of the Consolidated were posted without permission of respondent in the same place other notices were posted by employees [R. 408, 411]. Many collective bargaining contracts provide for the employer to make available to the union a bulletin board and

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[13]The solicitation of employees on company time to join the Consolidated was not the regular practice [R. 397, 424, 506]. It should also be noted that there was only evidence of one meeting of the Board of Directors of Consolidated on company premises, a meeting which was held just prior to a meeting of the Board with Meyerberg [R. 519-520; *cf.* 290, 292].

to permit the collection of dues in the plant; such contractual provisions are not in violation of the Act, and if an employer may properly so contract, he may by silent acquiescence permit the bargaining agent to do the same thing. Respondent's "support" of the picnic and wienie roast[14] sponsored by the Consolidated but to which all the employees and officers of respondent were invited [R. 265, 652-653], could hardly have been a violation of the Act. Certainly the mere fact that an employer is unionized does not preclude him from thereafter aiding the social functions of his employees. It is submitted that there is no substantial evidence that respondent contributed financial or other suppport to the Consolidated in violation of Section 8(2).

D. Asserted Manifestations of Preference for the Consolidated by Respondent.

The Board relies on three instances (petitioner's brief pp. 15-17) involving Meyberg, Hill and the Statement of Facts as indicating that respondent expressed a preference for the Consolidated over the AFL. Petitioner's account of Meyberg's conversation with Hook is incomplete. Hook was delinquent in paying dues to the Consolidated. He then went to Meyberg and asked if he would be laid off if he did not pay his dues to or did not belong to Consolidated. Meyberg replied "No." Hook then informed Meyberg that he had not been given receipts for the dues he had paid Consolidated and that was the reason he objected to paying them any more. It was then that Meyberg made the statement quoted in the Board's brief [R.

[14]The evidence does not establish that respondent "gave" the use of its shipping floor to the Consolidated for a dance.

504-505]. Consolidated was at that time the bargaining representative of respondent's employees; under such circumstances, respondent can hardly be held to have expressed a preference for Consolidated over the AFL by advising a delinquent member that it would keep harmony in the firm if he continued to pay his dues to that union.

As we have heretofore pointed out (*supra*, p. 15), by the Statement of Facts distributed by respondent in the fall of 1937, respondent did not express itself as favoring an inside union. Moreover, even if it be assumed that by this statement or by the statement of Meyberg to Hook respondent expressed a preference for an inside union, such an expression does not amount to a violation of the Act. *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. Ct. 344, 86 L. Ed. 306 (1941); *Diamond T Motor Car Co. v. National Labor Relations Board*, 119 F. (2d) 978, 982 (C. C. A. 7th, 1941); *Midland Steel Products Co. v. National Labor Relations Board*, 113 F. (2d) 800, 803-804 (C. C. A. 6th, 1940); *The Press Co., Inc. v. National Labor Relations Board*, 118 F. (2d) 937, 942 (C. A. D. C., 1940) *cert.* den. 313 U. S. 595, 61 S. Ct. 1118, 85 L. Ed. 1548 (1941), and cases there cited. There was not in the instant case a "complex of activities, such as the anti-union background of the Company," etc., as would justify, under the opinion in the *Virginia Electric & Power Company* case, a conclusion that these statements amounted to interference.

The statement attributed to foreman Hill by Thrift when considered by itself would constitute some evidence of a violation of the Act. However, of the number of witnesses who testified concerning the activities at respondent's plant over a period of almost four years, this

was the only incident testified to by any witness of an anti-AFL statement uttered by a single one of respondent's officers or supervisory employees. Such an insolated instance is not sufficient to sustain a finding of a violation of the Act. *E. I. du Pont de Nemours & Co. v. National Labor Relations Board*, 116 F. (2d) 388, 400 (C. C. A. 4th, 1940) *cert.* den. 313 U. S. 571, 61 S. Ct. 959, 85 L. Ed. 1529 (1941). Moreover, it could not have amounted to unlawful interference under Sections 8 (1) or (2) since it did not make any impression on Thrift at all (other than that the statement was one he should make a note of for the Board [R. 609-610] to assist the AFL clique in destroying Consolidated); he continued to remain a member of the AFL [R. 610]. *Cf. Diamond T Motor Car Co. v. National Labor Relations Board,* 119 F. (2d) 978, 982 (C. C. A. 7th, 1941); *Ballston-Stillwater Knitting Co., Inc. v. National Labor Relations Board,* 98 F. (2d) 758, 762 (C. C. A. 2nd, 1938). Thrift was well aware that he need not fear any reprisals from respondent if he continued active for the AFL, as he did.[15] In fact, at the hearing the Board struck out of its complaint the allegation that respondent had "interfered with, restrained and coerced its employees in the exercise of the rights

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[15]Thrift wore his AFL button continuously for a period of over a month prior to October 10, 1940, the day on which Hill allegedly made the quoted statement to him [R. 607, 613]. During this period Hill saw Thrift almost every day [R. 613-614], but said nothing to him about his union affiliation. On October 3, 1940, Thrift learned that he was to be layed off, and went to Meyberg and stated that he needed the work [R. 618]. Meyberg at that time knew Thrift was a member of the AFL [R. 656]. On the same day at a meeting of the Consolidated Board of Directors with Meyberg, he was asked what he would do about the approaching layoff of Thrift, and he replied that he was trying to keep him employed [R. 589-590], and he told Hill to keep Thrift working [R. 656], and Thrift was kept on [R. 605, 656].

guaranteed to them in Section 7 of the Act . . . through said Meyberg, Hill and others by attempting in divers manners to persuade and coerce various of its employees from joining and/or remaining members of the" AFL [R. 12, 253-254]. It is submitted that respondent did not interfere with the rights of its employees in violation of Sections 8 (1) or (2) of the Act by the above-referred to statements relied on by petitioner.

E. Conclusion as to Respondent's Alleged Violation of Sections 8 (1) and (2) of the Act.

The entire history of the Consolidated belies employer domination. It was formed following an expression in a secret ballot election by respondent's employees of a preference for an inside union. None of the officers or supervisory employees of respondent made any coercive or threatening statements to induce an employee to refrain from joining the AFL or to organize or join the inside union. Respondent has at all times been impartial. The so-called supervisory employees who participated in the movement to form the independent union did not hold positions which made respondent chargeable for their actions, and the evidence does not establish that a single employee believed or had reason to believe that they were acting on behalf of the management.

When the evidence concerning the Consolidated is examined in its entirety, the conclusion is inescapable that it was free from employer domination.[16] Consolidated

[16]For the convenience of the Court in examining the record, a chronological list of the minutes of the meetings of the Consolidated is set forth herein as Appendix "B," *infra*, p. 52. This list is not complete, since minutes of all of the meetings were not introduced in evidence. Some of the minutes admitted in evidence have not been printed in the record; in those instances, the exhibit number is given instead of the record page.

paid its own way. It paid for the expenses of incorporation, the premium on the bond of its treasurer, the corporate seal, union buttons, application and membership cards [R. 669-671]. It held monthly meetings of the membership at a rented hall, and held more frequent directors' meetings, usually at the home of one of the directors who was paid for its use [R. 231]. It paid sick benefits to its members [R. 675, 682]. From time to time, as the occasion required, it consulted and paid for the services of its attorney [R. 231, 528, 529, 554].

The union was organized with the design of establishing locals in other nursery firms and an effort, though unsuccessful, was made to obtain the affiliation with it of unions in the same industry [R. 219, 341, 579-580]. The officers and members were conscious of the duties and responsibilities of the union. Demands were frequently made upon respondent on behalf of the membership, and substantial benefits were obtained (*supra,* pp. 11, 31). The membership even resolved to recognize legitimate picket lines of other unions [R. 534, 538-539, 558a-559].

The officers and members of the Consolidated were likewise aware of the Wagner Act and sought to prevent any interference with its activities in violation of the Act. Its first president purchased a copy of the Act "to attempt to follow it to the best of our ability, as an independent organization bargaining for the employees" [R. 536]. Whenever it appeared that any member might be holding a supervisory position, his status was investigated, and

if found to be a supervisory employee, he was ousted from the union [R. 672, 676-677, 680, 682]. The record is conclusive that during the frequent bargaining conferences between officers of Consolidated and of respondent, the parties met at arms length. In fact, the union felt that "a little closer relationship" between it and respondent was in order and to achieve this and to acquaint the officers of respondent with the newly elected officers of Consolidated, the union invited the former group of officers to dinner with the latter group [R. 567-568].

During the period of nearly four years covered by the record, respondent did not lift a finger to encourage or assist the Consolidated. The union sought to strengthen its own position by seeking to have respondent grant preferential treatment to members of Consolidated in good standing. Though Meyberg at one time stated that, all other factors being equal, he would favor the members of Consolidated [R. 665-666], actually he never did so [R. 653, 654], and the minutes of the union's meetings are replete with complaints on this score [R. 555-557, 561, 579, 675, 678, 680]. Respondent's position, frequently expressed [R. 336, 504, 557, 561, 655], always was that an employee's status would not be affected by whether or not he was a Consolidated member. Beginning in the fall of 1940, Consolidated began demanding that respondent grant it a closed shop [R. 681-684]. Meyberg has at all times been opposed to a closed shop [R. 259-260, 557, 561], and that demand was not granted the union. "Such action on [respondent's] part is consistent only with Em-

ployer's assertion that it was neutral in fact, and at all times impartial in its attitude toward all unions." *Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board,* 114 F. (2d) 611, 621 (C. C. A. 7th, 1940).

The evidence does not establish that respondent dominated or interfered with the formation or administration of the Consolidated or contributed financial or other support to it, and the Board's finding of a violation of Section 8 (2) was unwarranted. Moreover, a violation of Section 8 (1) was not proved. The statement of Meyberg to Hook and Meyberg's "Statement of Facts" clearly were not improper. The alleged statement of Hill to Thrift did not interfere with Thrift's actions in any way and in any event was a single isolated instance not justifying a finding of the commission of an unfair labor practice. Finally, the evidence does not sustain the Board's contention that respondent gave undeserved credit to the Consolidated for the wage increases of the fall of 1940. It is submitted that the Record will not sustain the Board's findings of violations of the Act and that its petition for enforcement of its order should, therefore, be denied.

II.

The Board's Order Is Improper and Invalid.

We submit that the evidence does not warrant the entry of any order against respondent. But even if the Court sustains the Board's finding of a violation of the Act, we believe the Board's order is improper in the following respects:

In the first place, under the principles enunciated in *National Labor Relations Board v. Express Publishing Co.,* 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930 (1941), the omnibus cease and desist provision contained in paragraph 1(c) of the order is improper. *National Labor Relations Board v. Pacific Gas & Electric Co.,* 118 F. (2d) 780, 789 (C. C. A. 9th, 1941); *The Press Co., Inc. v. National Labor Relations Board,* 118 F. (2d) 937, 954 (C. A. D. C., 1941), *cert.* den. 313 U. S. 595, 61 S. Ct. 1118, 85 L. Ed. 1548 (1941); *National Labor Relations Board v. Calumet Steel Division of Borg-Warner Corp.,* 121 F. (2d) 366, 371 (C. C. A. 7th, 1941). In the most recent case involving this problem, though violations of subdivision (2) and (3) and apparently (1) of Section 8 were found, the court struck out the omnibus provision in its entirety. *National Labor Relations Board v. Swift & Co.,* 6 CCH Labor Cases ¶ 61,188 (C. C. A. 8th, 1942) (not yet officially reported). We believe that paragraph 1(c) herein similarly should be stricken in its entirety since respondent's violations of the Act, if any, were all in connection with the formation and

administration of the Consolidated. *National Labor Relations Board v. American Rolling Mill Co.,* 126 F. (2d) 38, 42 (C.C.A. 6th, 1942.) In any event, that paragraph should be restricted to the rights interfered with and the manner of respondent's interference.

Secondly, we believe that on the record in this case, it is improper to require the withdrawal of recognition of and the disestablishment of the Consolidated, and that paragraphs 1(b) and 2(a) should accordingly be denied enforcement. Though respondent may be found to have interfered with the formation of the Consolidated, the evidence establishes that long prior to the Board hearing it was free of any employer domination.

Finally, if paragraphs 1 (b) and 2 (a) are retained, we submit that the order should be modified by adding thereto some provision such as the following: "This order does not restrict but is intended to protect the right of the employees freely to join or not to join any labor organization or to form or not to form hereafter a local organization of their own." *Hamilton-Brown Shoe Co. v. National Labor Relations Board,* 104 F. (2d) 49, 56 (C. C. A. 8th, 1939); *Westinghouse Electric & Mfg. Co. v. National Labor Relations Board,* 112 F. (2d) 657, 661 (C.C.A. 2d, 1940) aff'd 312 U. S. 660, 61 S. Ct. 736, 85 L. Ed. 1108 (1941); *National Labor Relations Board v. American Rolling Mill Co., supra.* The natural effect of the Board's order will be to lead those employees of respondent who are not familiar with the circumstances surrounding the organization and administration of the Consolidated to believe that an inside union is improperf under the Act.

Conclusion.

It is submitted that there is no substantial evidence establishing that respondent has violated either Sections 8 (1) or (2) of the Act, and that the Board's petition for enforcement of its order should be denied. If the Court sustains the Board's findings of fact, nevertheless, paragraph 1(c) of the order should be denied enforcement or at least limited in scope and paragraphs 1(b) and 2(a) should be stricken or, if not, a provision should be added to the order clearly setting forth the right of respondent's employees to remain unorganized or to form another local organization of their own.

Respectfully submitted,

LATHAM & WATKINS,
By PAUL R. WATKINS,
By RICHARD W. LUND,

1112 Title Guarantee Building,
411 West Fifth Street,
Los Angeles, California,
Attorneys for Respondent.

July 30, 1942.

APPENDIX A.

The pertinent provisions of the National Labor Relations Act [Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C., Secs. 151-166 (Supp. II, 1936)] are as follows:

Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act—

* * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the Dis-

trict of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

* * * * * * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * *

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein

the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B.

CHRONOLOGICAL LIST OF MINUTES IN EVIDENCE

Date	Nature of Meeting	Record Page
September 9, 1937	Pre-Organization Committee	446-449
September 10, 1937	Pre-Organization Committee	449-450
September 14, 1937	Employees general meeting	450-456
September 14, 1937	Assemblymen and representatives	456-459
September 20, 1937	Incorporators	221-222
September 20, 1937	Board of Directors	222-227
September 28, 1937	Board of Directors	227-231
October 5, 1937	Board of Directors	Bd. Exh. 19-A
October 13, 1937	Board of Directors	465-466, 668-670
November 2, 1937	Board of Directors	467
November 9, 1937	General Union Meeting	441-444
December 7, 1937	Board of Directors	671
December 14, 1937	General Union Meeting	533-534
January 7, 1938	Board of Directors	Bd. Exh. 27
January 18, 1938	Board of Directors	672, 525-526, 528
January 25, 1938	Board of Directors	Bd. Exh. 24-C
February 1, 1938	Board of Directors	Bd. Exh. 24-D, 522-523
February 10, 1938	Board of Directors	531-532, Bd. Exh. 23-F, Bd. Exh. 23-B
February 22, 1938	General Union Meeting	673-674, Bd. Exh. 25-B, Bd. Exh. 26
March 1, 1938	Board of Directors	674, 524-525
April 5, 1938	Board of Directors	532-533
April 18, 1938	General Union Meeting	545-546, Bd. Exh. 28-B
May 3, 1938	Board of Directors	554-555, 675, 546-547
May 12, 1938	Board of Directors	547-549
May 16, 1938	General Union Meeting	549-552
June 7, 1938	Board of Directors	566
July 18, 1938	General Union Meeting	675
August 9, 1938	Board of Directors	566-567, Bd. Exh. 36-A, 560, Bd. Exh. 29-B
August 15, 1938	General Union Meeting	676
September 6, 1938	Board of Directors	555, 556-557

Date	Nature of Meeting	Record Page
September 9, 1938	Board of Directors	557-558
September 19, 1938	Board of Directors	676-677
October 4, 1938	Board of Directors	677
October 17, 1938	General Union Meeting	678
December 6, 1938	Board of Directors	Bd. Exh. 36-B
January 3, 1939	Board of Directors	678
January 16, 1939	General Union Meeting	561
March 7, 1939	Board of Directors	Bd. Exh. 29-G
April 4, 1939	Board of Directors	568-569
May 2, 1939	Board of Directors	Bd. Exh. 32-C
September 5, 1939	Board of Directors	569-570
September 26, 1939	General Union Meeting	679
October 3, 1939	Board of Directors	570, 679-680
December 5, 1939	Board of Directors	571
June 4, 1940	Board of Directors	680
August 20, 1940	General Union Meeting	358-359
September 13, 1940	General Union Meeting	360-362
September 23, 1940	Board of Directors	519
September 23, 1940	Board of Directors	Bd. Exh. 34-A
September 25, 1940	Board of Directors	Bd. Exh. 34-B
October 1, 1940	Board of Directors	Bd. Exh. 35-B
October 3, 1940	Board of Directors	589-590
October 8, 1940	Board of Directors	592-594
November 6, 1940	Board of Directors	680-681
November 19, 1940	General Union Meeting	681
December 4, 1940	Board of Directors	682
January 8, 1941	Board of Directors	683
February 5, 1941	Board of Directors	683, Bd.Exh. 35-A
March 21, 1941	General Union Meeting	684
April 1, 1941	Board of Directors	684